

Please return to: [Insert Permittee's mailing address]

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

STORMWATER FACILITY AGREEMENT
AND COVENANTS (Commercial Version)

THIS AGREEMENT ("Agreement") is made and entered into this ____ day of _____, 20__, by and between **XYZ, Inc.** ("Permittee"), and the City of Durham, a North Carolina municipal corporation ("City"). The obligations of this Agreement run with and are appurtenant to the Property described in this Agreement.

1. Background and Definitions

a. Scope of Agreement. Permittee owns and is developing property ("the Property") that contains one or more constructed stormwater improvements (the "Facility/ies") to control stormwater runoff and pollution. After construction of the Facility/ies, Permittee and its successors in interest will be responsible for perpetual maintenance, annual inspection, repair, reporting to the City, and reconstruction of the Facility/ies. This Agreement sets forth the requirements the Permittee assumes for the construction, perpetual maintenance, annual inspection, repair and reconstruction of the Facility/ies. This Agreement runs with and is appurtenant to the Property, described in (b) below.

b. Property to which this Agreement Attaches. The Property is described at **Plat Book XXX, Page XXX**, Durham County Register of Deeds. It is generally located **west of the intersection of XXXXX XXXXX and XXXX XXXX, and is commonly known as XXXXXXXXXXXXXXXXXXXXXXXX**. It is part or all of the property acquired by Permittee in deeds recorded in **Deed Book XXXX, Page XXX**, Durham County Register of Deeds. The Facility/ies subject to this Agreement is/are generally described below: *(Describe approximate size of each facility and main feature – e.g., wetlands, dry pond, wet pond, etc. If any Facility is located on a separate lot or tract within the Property, and the location is known, identify the specific lot or tract where the Facility is located.)*

i. *(description)*

ii. *(description of Facility 2)*

c. Background. This Agreement is intended to comply with City ordinances and policies that implement State and Federal law and that require development to provide stormwater facilities to control runoff and to mitigate pollution. City ordinances require private property owners to perpetually inspect, maintain, and reconstruct these facilities in accordance with City requirements.

d. Relationship to Ordinance and Guidelines. This document does not supersede requirements regarding

stormwater facilities found in City ordinances, guidelines, or policies. Such ordinances, guidelines, or policies shall supplement this Agreement and Covenants. When they are in conflict, the stricter requirements shall control.

e. Definitions. The terms in this Agreement have the following definitions:

"City Manager" means the Durham City Manager or a Deputy City Manager.

"City Requirements" means the written ordinances, policies, protocols, procedures, standards, and guidelines of the City of Durham as they may be changed from time to time.

"Director of Public Works" or "Director" means the City's Director of Public Works or his or her designee.

"Facility/ies" means the stormwater control device(s) that is/are the subject of this Agreement and may include more than one such device.

"Lot" means a lot within the Property, whether developed or undeveloped.

"Lot Owner" means the legal owner of any Lot.

"Permittee" means the party executing this Agreement with the City and successor owners of the Property or of any Lot within the Property whether or not successors in interest have executed an Agreement with the City. Permittee does not include an owner who possesses solely a beneficial interest in a Lot.

"Person" includes but is not limited to natural persons, business trusts, joint ventures, governments, governmental subdivisions, governmental agencies, firms, corporations, associations, partnerships, and other legal entities.

"Property" is as described by deed book and page reference and plat book and page reference above, and means the land that is owned by the Permittee at the time of recordation of this Agreement.

"Stormwater Facility Replacement Fund Payment" (hereafter "Fund Payment") is the payment that may be made by Permittee to a fund established by the City which is used for replacement of stormwater facilities or construction of new facilities intended to mitigate the burden on existing facilities

"Transfer" includes sell, convey, assign or alienate all or a portion of an interest in the Property.

2. Permittee's Obligations to Record Documents; Provide Security for Continuing Maintenance and Reconstruction; Construct Facility.

a. Recordation of Executed Agreement/Timing. Permittee shall cause this Agreement to be legally executed by all necessary parties so as to bind the Permittee, the Property, and all successors in interest in the Property, and shall record the executed Agreement with the Durham County Register of Deeds. The recordation shall be at such point in the development process as specified in City Requirements, which shall be prior to City construction drawing approval or issuance of any utility permits for the Property and prior to transfers by Permittee of any Lots within the Property. If a plat has been submitted to subdivide the Property, this Agreement shall be recorded prior to or contemporaneously with the recordation of such plat.

b. Delivery of Recorded Documents/Payment to Ensure Maintenance and Reconstruction. At such time as is specified in City Requirements, which shall be prior to City construction drawing approval or issuance of any utility permits on the Property, Permittee shall deliver to the City copies of the following:

i) a certificate of an attorney licensed to practice law in the state of North Carolina in form and substance satisfactory to the City that the Agreement has been legally executed by all necessary parties in such a manner as to bind the Permittee and the entire Property, that recordation occurred prior to any transfer of the Property or Lot within the Property, and such other things as may be specified by the City;

ii) this Agreement, recorded;

iii) the estimated Stormwater Facility Replacement Fund Payment as prescribed in City Requirements or an alternative security of 20 times the maintenance cost of the Facility/ies, as calculated under City Requirements;

iv) pay the Stormwater Permit Fee for each of the Facility/ies, as prescribed in City Requirements.

c. Construction/Inspection/Certification/Submission of As-Builts/Deadlines. Permittee shall construct the Facility/ies in accordance with the plans approved by the Director of Public Works. Permittee shall complete

construction and cause the Facility/ies to be finally inspected and certified, in accordance with the City of Durham's BMP Certifying Engineer Program, by the design engineer of record or such other registered North Carolina Professional Engineer acceptable to the City, complete any repairs necessary to the Facility/ies, provide reproducible as-built drawings and as-built calculations acceptable to the City, and submit any records regarding the cost of the Facility as may be required by the City¹. If these steps have not been completed prior to issuance of a certificate of compliance for occupancy of a building on the Property, Permittee shall provide a Letter of Credit or other security instrument acceptable to the City in an amount calculated under City Requirements to ensure completion. If construction of the Facility/ies and the further obligations of this Section 2 are not completed in a timely manner as described in City Requirements, the City may also withhold any permits relating to development of all or a portion of the Property and take any other actions available under law².

d. **Obligations Run with Property; Joint and Several Liability; Property Owners' Association.** The obligations of this Agreement shall run with and are appurtenant to the Property and shall bind any successors in interest, including owners of any Lots within the Property. With regard to the City's rights under this Agreement, responsibility and liability against Permittee and its successors in interest, including but not limited to Owners of a Lot within the Property, are joint and several. With regard to rights amongst Owners of Lots within the Property, such Owners may elect to establish an association to be responsible for Permittee's obligations under this Agreement and other responsibilities relating to the Property. Creation of an association does not reduce the City's rights under this Agreement. If Permittee creates an association Permittee shall ensure that (i) dues and regular payments made by Lot owners are sufficient to ensure compliance with this Agreement, (ii) special assessments to comply with the obligations of this Agreement may be made; and (iii) enforcement mechanisms are available to compel payment by each member as necessary to comply with the obligations of this Agreement.

e. **Release of Permittee.** The original Permittee in this Agreement and successors in interest who, in writing, join in this Agreement may be released from the obligations of Section 2 of this Agreement upon the filing of a release signed by the City's Director of the Department of Public Works. The City shall provide such release within 30 days of submission of required forms, information, and fees³.

3. Permittee to Maintain, Inspect, Repair, and Reconstruct Facility.

a. **Compliance with City Requirements.** After construction of the Facility(ies) in accordance with City Requirements, the Permittee shall be responsible for inspection, maintenance, repair, reporting to the City, reconstruction, and funding for the completed Facility/ies, and shall comply with all City Requirements regarding the same⁴.

b. **Responsible Person for Facility.** Permittee, including successor Lot Owners, shall maintain with the Director the name and contact information of a Person knowledgeable about the care and upkeep of the Facility/ies. Such Person may be a Lot Owner, agent or officer for an association of Lot Owners, or management company⁵.

c. **Maintenance.** The facility/ies shall be maintained in compliance with City Requirements and with the operations and maintenance manual prepared specifically for the Facility/ies. Standards for maintenance of Facility/ies are located in the City of Durham's "Owner's Maintenance Guide for Stormwater BMPs Constructed in the City of

1 See the following BCE Program Documents: (1) BMP Certifying Engineer Program; (2) General Certification Assessment Checklist; (3) General As-Built and Construction Certification; (4) Geotechnical Certification

2 See Letter to Industry 12-18-08

3 See BMP Certificate of Acceptance

4 See the following BMC Program Documents: (1) BMP Annual Maintenance Certification Protocol; (2) BMP Maintenance Certifier Program; (3) Certification; (4) Conditional Certification; (5) EMR Submittal Form; (6) Inspection Report Form(s)

5 See BMP Owner's Financial Disclosure Certification Statement

Durham” as it may be modified from time to time. The current version of the “Owner’s Maintenance Guide for Stormwater BMPs Constructed in the City of Durham” can be viewed at or downloaded from the City’s website at http://www.durhamnc.gov/departments/works/pdf/draft_owners_maint_guide.pdf⁶

d. Inspections. In accordance with the City of Durham’s current BMP annual maintenance certification protocols, policies, procedures, and requirements, the Permittee shall cause the Facility/ies to be inspected, at a minimum, annually by a registered North Carolina Professional Engineer or a North Carolina Registered Landscape Architect, certified by the City. The inspection shall occur annually during the month in which the Facility/ies as-built certification was accepted by the City. Without specific request of the City, two copies of the inspection report shall be provided to the Director of Public Works. Permittee shall also cause the Facility to be inspected after events that cause visible damage to the Facility and when notified by the Director that the Facility/ies requires inspection⁷.

e. Repair and Reconstruction. Permittee shall repair and/or reconstruct the Facility/ies as needed to allow the Facility/ies to function as designed. Permittee shall make any repairs identified in the inspection report provided under (d) above and as may be reasonably directed by the City from time to time based on City requirements or City inspections of the Facility/ies. Compliance with inspection reports or City directives shall not limit Permittee’s repair obligations⁸.

f. No Public Adoption. The City’s regulation of the Facility/ies does not constitute adoption of the Facility/ies by the City, nor does it prohibit Permittee from taking all necessary actions to maintain the Site and Facility/ies in a safe manner.

g. Automatic Release of Successor Owners. Successor Permittees or Lot Owners within the Property, not including the original Permittee or a Permittee who executes an agreement joining in this Agreement, shall be released from the obligations of this Agreement upon Transfer of all interest in the Property without the requirement of any writing from the City effecting such release. The Person acquiring the Property or an interest therein shall assume the obligations of this Agreement. Permittee and successors that execute a written agreement joining in this Agreement shall be released from the obligations of this Agreement only through a written document from the City as described in 2(e) above.

4. Stormwater Facility Replacement Payment and Fund.

If Permittee makes a payment to the Stormwater Facility Replacement Fund, such payment shall be calculated, retained, used, and disbursed as provided by ordinance and other City Requirements. The Fund shall be used for the purchase, design, construction, reconstruction, and repair of stormwater facilities that have paid into the Fund or for stormwater facilities that replace or mitigate the need for those facilities for which monies have been paid into the Fund.

5. City Easement/Right of Entry/No City Responsibility

Permittee grants to the City, including employees, agents, and contractors of the City, a permanent easement for inspection, repair, and other work on the Facility which easement shall be located as shown on existing or future

6 See the following BMC Program Documents: (1) BMP Annual Maintenance Certification Protocol; (2) Owner’s Maintenance Guide for BMPs Constructed in the City of Durham

7 See the following BMC Program Documents: (1) BMP Annual Maintenance Certification Protocol; (2) BMP Maintenance Certifier Program; (3) Certification; (4) Conditional Certification; (5) EMR Submittal Form; (6) Inspection Report Form(s)

8 See the following BMC Program Documents: (1) Conditional Certification; (2) EMR Submittal Form; (3) BMP Owner’s Financial Disclosure

recorded plats for all or a portion of the Property. Permittee also grants to the City, including employees, agents, and contractors of the City, a permanent nonrevocable right of ingress, egress, and regress over and across all other public and private utility easements and public and private streets that exist on all or a portion of the Property and all land that may be owned or controlled by an association created amongst owners of lots in the Property. The City shall use this right of access solely to inspect and perform construction or other work on the Facility/ies that the City determines in its reasonable discretion is necessary. The creation of these rights does not limit the City's access to or across Lots within the Property if such is necessary to respond to a public nuisance or emergency. The City's rights under this section and under any plats filed for all or a portion of the Property do not obligate the City to take any actions regarding inspection, repair, or reconstruction of the Facility/ies.

6. Remedies for Violations; Lien on Property; Future Obligations Secured.

a. City Performance of Work. In the event of a failure to comply with the obligations under this Agreement, or evidence of a substantial problem with or potential failure of the Facility/ies, the City may send notice to the Permittee or the agent identified in Section 3 above to demand performance under this Agreement. If the Permittee fails to comply with such demand within thirty (30) days from the date of mailing thereof, the City may enter the Property and perform some or all of the obligations under this Agreement, as determined in the reasonable discretion of the Director. In addition, the City may enter the property without notice in the event of an imminent failure of the Facility/ies or other imminent emergency related to the Facility/ies. Nothing in this Agreement shall be interpreted to require the City to perform such work or obligations.

b. Repayment of City. The City shall deliver to the Permittee or Agent identified in Section 3 written notice of the costs of actions or work performed under Paragraph (a) above, which shall include but are not limited to the City's costs of administration and overhead for such work, and Permittee shall pay all such costs within sixty (60) days after receipt of such notice. Any costs not paid to the City within the sixty (60) day period shall be delinquent, and Permittee shall be considered in default of this Agreement. In the event of such default, the City may bring an action at law against Permittee for the cost of the actions and work, plus interest at the rate of eight percent (8%) per annum, collection costs, late payment charges of three hundred dollars (\$300) per calendar day during the first ninety (90) days of default and five hundred dollars (\$500) per calendar day for each ninety (90) days thereafter, and reasonable attorneys' fees. In addition, the debt shall be a lien against the Property and the Lot(s). With notice to the Permittee and Lot Owner(s), such lien may be collected as unpaid taxes in accordance with N.C.G.S. 160A-193. The City may also foreclose on the lien.

c. Other Remedies. The remedies provided above do not limit the City's remedies and the City retains the right to use all remedies available in law and in equity to enforce this Agreement.

d. Withholding of Permits. The City may withhold any or all permits or other approvals necessary to complete the development of the Property if the Permittee has failed to perform its obligations under this Agreement⁹.

7. Release of Lien by Certificate.

a. Duty to Furnish a Certificate. On the request of any of the Persons described in subdivision (a) (i) below, and upon the condition prescribed by subsection (a) (ii) below, the Director of Public Works shall furnish a written certificate stating the amount of any monetary liabilities owed by the Permittee to the City pursuant to this Agreement (together with any interest and costs accrued thereon) that are a lien on the Property or the Lots.

- i. Who May Make Request -- Any of the following Persons shall be entitled to request the certificate:
- A. An owner of the Property;

⁹ See Letter to Industry 12-18-08

- B. An occupant of the Property;
- C. A Person having a lien on the Property;
- D. A Person having a legal interest or estate in the Property;
- E. A Person having a contract to purchase or lease the Property or a Person having contracted to make a loan secured by the Property;
- F. The authorized agent or attorney of any Person described in subdivisions (a) (i) (A) through (E) above.

ii. **Duty of Person Making Request.** -- The Director of Public Works shall not be required to furnish a certificate unless the requester specifies the name of the Permittee, specifies the recordation information in the office of Register of Deeds where this Agreement and all subsequent Agreements related to this Agreement are recorded, and provides a copy of the first page of this Agreement, and pays the required fee for provision of a certificate, if any.

b. **Reliance on the Certificate.** When a certificate has been issued as provided in Section 7(a) above for the Property or a Lot, all monetary liabilities owed pursuant to this Agreement that have accrued against the Property or Lot for which the certificate was issued shall cease to be a lien against such property identified, except to the extent of monetary liabilities stated to be due in the certificate, as to all Persons obtaining such a certificate and their successors in interest who rely on the certificate:

- i. By paying the amount of monetary liabilities stated therein to be a lien on the Property;
- ii. By purchasing or leasing the Property; or
- iii. By lending money secured by the Property.

c. **Oral Representations not Binding.** Without limiting the effect of this Section 7, it is agreed that no oral statement made by any City employee as to the amount of monetary liabilities that are a lien on the Property pursuant to this Agreement shall bind the City.

8. **Warranty.** The Permittee covenants with the City that Permittee is seized of the Property in fee simple, has the right to convey the same in fee simple, that title is free and clear of all encumbrances, except for those identified in the Opinion of Title furnished to the City as a requirement prior to the City's execution of the Agreement, and that Permittee will warrant and defend the title against the lawful claims of all persons except for the exceptions stated in such opinion of title.

9. **Notice.** When a notice is required or permitted by this Agreement, it shall be given in writing to the City delivered to the Director of Public Works, 101 City Hall Plaza, Durham, NC 27701, or upon the Permittee, at **XYZ, Inc., XXXXXXXXXXXXXXX, XXXXXXXX, NC 27xxx, Attention: Donald Duck (919) XXX-XXXX**. Written notice shall be by certified mail, return receipt requested. These addresses may be changed by sending a notice of the new address attached to a copy of this Agreement.

10. **No Waiver of Breach.** If the City fails to enforce or waives any breach of any obligation or covenant in this Agreement, that failure to enforce or waiver shall not constitute a waiver of any other or future breach of the same or any other obligation or covenant. The City's failure to exercise any right under this Agreement shall not constitute a waiver of that right.

11. **Agreement Binding.** This Agreement and Covenants shall bind the Permittee and its successors in interest, as defined in this Agreement, until the City releases the Permittee as provided in Section (2) above, or until an automatic release of successor owners occurs as provided in Section (3) above.

12. **Amendment.** Amendments to this Agreement made after Permittee has fulfilled its obligations under this Agreement or made after Permittee has ceased to exist need not be signed by the Permittee. Amendments may be made

if signed by all owners of and within the Property and the City, and such amendments may modify the obligations of this Agreement. The City may void or cancel its rights under the Agreement through a release or other filing executed by the City Manager, who is authorized by the City Council to determine whether a release is in the City's best interest and to execute such release.

13. Covenants Herein to Run with the Property. The obligations of this Agreement are a perpetual servitude and run with and are appurtenant to the Property.

14. Successors and Assigns. The designation of Permittee and the City shall also include their heirs, assigns, and successors in interest.

15. Liability; Indemnification.

a. The approval by the City or any employee of the City of any plans or of any work referred to in this Agreement shall not create any liability in the City or its officers, officials, or employees for the plans or the work. Nothing herein is intended to release any other Person for any liability for those plans or work.

b. The performance by the City or any employee of the City of any work allowed under this Agreement shall not create any liability in the City or its officers, officials, or employees for the work. Nothing herein is intended to release any other Person for any liability for that work.

c. The Permittee shall indemnify the City and its officers and employees for any costs to the City or its agents or employees from the construction, operation, maintenance, repair, and/or reconstruction of the Facility/ies, or resulting from a claim regarding the same.

16. No Third Party Rights. Except as may be explicitly provided in this Agreement, this Agreement is not intended to be for the benefit of any Person other than the parties hereto and their heirs, successors, and assigns.

17. Interpretation of this Agreement. Unless the context requires otherwise, the singular includes the plural, the plural includes the singular, and the neuter includes the masculine and feminine. The captions and titles are for convenience only, and are not to be used to interpret the Agreement. The words "include" and "including" mean, respectively, "include but not limited to", and "including but not limited to".

18. Severability. Invalidity of any term or provision in this Agreement by a court of competent jurisdiction shall not invalidate the remaining terms and provisions.

IN WITNESS WHEREOF, the parties hereto have respectively set their hands and seals, or if corporate, have executed this under seal by their proper officers, the date first above written.

XYZ, Inc.

ATTEST:

Signed: _____

Signed: _____

Printed Name: _____

Printed Name: _____

Title: _____ Secretary

Title: _____ President

[Affix Corporate Seal]

STATE OF _____

COUNTY OF _____

I, _____, a notary public for said county and state, certify that _____ personally appeared before me this day, and acknowledged he or she is _____ Secretary of **XYZ, Inc.**, a corporation, and that by authority duly given and as the act of the corporation, the foregoing contract with the City of Durham was signed in its name by its _____ President, whose name is _____ and attested by him/herself as its said Secretary or Assistant Secretary.

This the _____ day of _____, 20__

Notary Public

My commission expires:

ATTEST:

CITY OF DURHAM

By: _____

City Clerk

[Affix Municipal Seal]

City Manager

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

I, _____, a notary public in and for the County of Durham, North Carolina certify that _____ personally appeared before me this day and acknowledged that he/she is City Clerk of the **CITY OF DURHAM**, a municipal corporation, and that by authority duly given and as the act of the City, the foregoing contract was signed in its name by its _____ City Manager and attested by himself/herself as its said City Clerk or Deputy City Clerk.

Witness my hand and notarial seal, the _____ day of _____, 20__.

My commission expires:

Notary Public